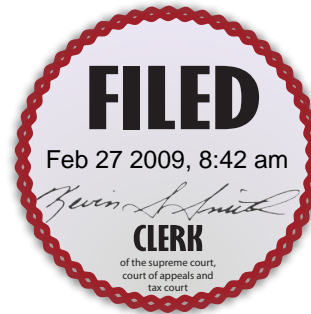


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)	
)	
Appellant-Respondent,)	
)	
vs.)	No. 49A02-0808-PC-709
)	
HENRY ANTHONY,)	
)	
Appellee-Petitioner.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Edward F. Schrager, Special Judge
Cause No. 49G03-9812-PC-206187

February 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

The State appeals the grant of Henry Anthony's successive petition for post-conviction relief from his conviction for murder.¹ The State raises one issue, which we restate as: whether the post-conviction court erred when it found both appellate and post-conviction counsel ineffective.

We reverse.

FACTS AND PROCEDURAL HISTORY

The facts set forth by this court in Anthony's first appeal are as follows:

On October 31, 1998, Anthony went to a dance hosted by the Naptown Riders Motorcycle Club at a bingo hall in Indianapolis. At some point that night, Anthony had a confrontation with Raymond Martin outside of the hall. Martin drew his 9mm handgun, which he was known to carry. Kevin Chaney, a member of Martin's motorcycle club called the Mobile Ground Shakers, took the gun from Martin and convinced him to leave the dance. Chaney gave the gun back to Martin before they drove to another motorcycle club, the Black Angels. After about twenty minutes at the Black Angels, the pair drove in separate vehicles to another motorcycle club called the Road Kill. They parked their vehicles, and Martin started toward the club as Chaney remained to talk with another individual.

At the same time, around 4:15 a.m., Anthony stood outside of the Road Kill talking with several people. Martin approached Anthony, smiled, threw his cigar to the ground, and pulled his coat to the side to display his handgun. Anthony knocked Martin to the ground, where Anthony and Richard Lay proceeded to kick and hit Martin about the head and body. Anthony's father, James Anthony (James), pulled Anthony off of Martin. As Martin staggered to his feet, Martin pulled out his gun and fired twice, once in the air, and repeatedly told everyone to keep back. Martin pointed the gun downward as he tried to stagger away, but James eventually convinced Martin to hand over the gun. After Martin surrendered the gun, Anthony shot Martin with a .45 caliber handgun owned by his father, James. Thereafter, James threw Martin's handgun under Martin's nearby vehicle and waited for the police. Anthony and Lay, however, left the scene with several others.

¹ See Ind. Code § 35-42-1-1.

During the above encounter, several individuals came running up to Chaney in the parking lot and told him that one of his club brother's was being attacked. As Chaney ran toward the commotion, he heard two consecutive gunshots and, after a pause, possibly a third shot. He broke through the crowd to see Martin lying on the ground with three or four people standing near him, one of whom was kicking Martin in the head. People ran away as Chaney tried to comfort Martin, who was lying in the street gasping for air. The police arrived soon thereafter. Martin was transported to the hospital, where he was pronounced dead around 5:30 a.m. Martin died of a gunshot wound to his chest.

Anthony's two-day jury trial commenced on May 17, 1999. The primary eyewitness against Anthony was James Jones. Jones testified that, upon the urging of another individual, he came out of the Road Kill in time to hear James tell Martin to give up the gun. Jones further testified that Martin was "beat up and staggering." *Record* at 227. After Martin surrendered the gun to James, Jones testified that he observed Anthony shoot Martin. Jones also saw James throw a gun under Martin's vehicle after the shooting. Jones was the only witness to testify that he saw Anthony shoot Martin. While James testified that his son, as well as Lay, did beat Martin before and after the gun was taken from Martin, James implied that Martin shot himself in the chest prior to the second round of fighting. James also testified that his .45 caliber handgun never left his possession that evening and was not fired by anyone, despite forensic evidence to the contrary. The jury convicted Anthony of murder as charged.

Anthony v. State, No. 49A02-0308-PC-668 (Ind. Ct. App. Mar. 2, 2004).

Anthony was represented on his direct appeal by attorney Hilary Bowe Ricks, who successfully moved to dismiss the appeal without prejudice so that post-conviction proceedings could be pursued pursuant to the *Davis/Hatton*² procedure. In his original petition for post-conviction relief, Anthony argued that he received ineffective assistance of trial counsel alleging that his trial counsel, attorney Kenneth Kerns, "failed to conduct

² The *Davis/Hatton* procedure involves the suspension or termination of a direct appeal that has already been initiated to allow a petition for post-conviction relief to be pursued. *Hatton v. State*, 626 N.E.2d 442 (Ind. 1993); *Davis v. State*, 267 Ind. 152, 368 N.E.2d 1149 (1977).

adequate discovery in preparation for trial, represented [Anthony] under a conflict of interest, failed to make proper objections and motions during trial, failed to tender proper jury instructions, and failed to assure that [Anthony] received a full and fair trial as he was entitled to.” *Appellant’s App.* at 60. He additionally asserted that the State had withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)³ and that newly discovered evidence existed. The post-conviction court denied this original petition.

Anthony then filed an appeal, raising issues on direct appeal from his conviction at trial and on appeal from the denial of his post-conviction petition. On direct appeal, Anthony contended that insufficient evidence was presented to support his murder conviction. On appeal from his denial of post-conviction relief, Anthony again argued ineffective assistance of his trial counsel. This court issued a memorandum decision, which affirmed both the trial court and the post-conviction court. The Indiana Supreme Court denied Anthony’s petition for transfer.

Anthony next sought and obtained permission from this court to file a successive petition for post-conviction relief. However, the petition was limited to the following grounds: any violation of *Blakely v. Washington*⁴; ineffective assistance of appellate counsel; and ineffective assistance of post-conviction counsel. At the hearing on his successive post-

³ Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or the bad faith of the prosecution.” *Id.* at 87.

⁴ 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

conviction petition, Anthony presented the testimony of Detective Tom Tudor, trial counsel Kerns, appellate and post-conviction counsel Ricks, a defense investigator, and his mother. Anthony also testified. The post-conviction court granted Anthony's petition, finding Ricks ineffective as appellate counsel and as post-conviction counsel. The State now appeals.

DISCUSSION AND DECISION

When the State appeals a grant of post-conviction relief, we apply the standard of review prescribed in Indiana Trial Rule 52(A): “we will ‘not set aside the findings or judgment unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.’” *State v. Jones*, 783 N.E.2d 784, 787 (Ind. Ct. App. 2003) (quoting *State v. Hammond*, 761 N.E.2d 812, 814 (Ind. 2002)). “The ‘clearly erroneous’ standard is a review for sufficiency of the evidence, and thus we neither reweigh the evidence nor determine the credibility of the witnesses but consider only the evidence that supports the judgment and the reasonable inferences to be drawn from that evidence.” *Id.* (citing *State v. Holmes*, 728 N.E.2d 164, 168 (Ind. 2000), *cert. denied* (2001)). We will reverse only upon a showing of clear error, that which leaves us with a definite and firm conviction that a mistake has been made. *Id.*

I. Ineffective Assistance of Appellate Counsel

The standard of review for claims of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in his or her performance and that the deficiency resulted in prejudice. *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984)). To satisfy the first prong, the defendant must show that counsel's performance was deficient, which requires a showing that counsel's representation fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. *Id.* (citing *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002)). To satisfy the second prong, the petitioner must demonstrate that he was prejudiced by counsel's deficient performance. *Id.* To show prejudice, a petitioner must show that there is a reasonable probability that the outcome of the trial would have been different if counsel had not made the errors. *Id.* A probability is reasonable if it undermines confidence in the outcome. *Id.*

Ineffective assistance at the appellate level of proceedings generally falls into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Wright v. State*, 881 N.E.2d 1018, 1023 (Ind. Ct. App. 2008) (citing *Bieghler v. State*, 690 N.E.2d 188, 193-95 (Ind. 1997), *cert. denied* (1998)), *trans. denied*. The two prongs of the *Strickland* test are separate and independent inquiries. *Zachary v. State*, 888 N.E.2d 343, 346 (Ind. Ct. App. 2008) (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. 2052), *trans. denied*. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." *Id.*

The State argues that the post-conviction court erred in finding that Anthony's appellate counsel was ineffective because that determination was not supported by the record. In its order granting Anthony's petition, the post-conviction court found that Ricks was ineffective as appellate counsel because she only raised the issue of insufficient evidence on

direct appeal and failed to raise the issue of a *Brady* violation by the State during Anthony's trial.

To prevail on a *Brady* claim, a defendant must establish: (1) that the evidence at issue is favorable to the accused, because it is either exculpatory or impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the evidence was material to an issue at trial. *Ransom v. State*, 850 N.E.2d 491, 498 (Ind. Ct. App. 2006). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.*

Here, evidence was presented at Anthony's successive post-conviction hearing that James, Anthony's father, was charged with perjury and obstruction of justice in connection with Anthony's murder case while it was pending and that these charges against James were subsequently dismissed prior to James testifying for the State in Anthony's trial. At the time of the hearing, both the prosecutor's file and the clerk's file regarding these charges had been destroyed. Additionally, testimony was given that an unknown caller had called the police during the investigation of this murder and stated that the caller had spoken with an eyewitness of the murder and that James had actually been the shooter. None of this evidence was given by the State to the defense prior to trial. Although Ricks raised the issue of a *Brady* violation in Anthony's original petition for post-conviction relief, she did not present any evidence on the issue at the original hearing because she had not found anything. She likewise did not raise the issue on appeal.

The above evidence regarding James was speculative as to his involvement in the murder. No evidence was presented as to why he was charged with perjury and obstruction of justice, whether it was because he initially lied to the police about Anthony's involvement in the shooting and hid the gun or whether the charges would implicate James in the murder at all. Further, the evidence regarding the unknown caller who implicated James as the shooter was never substantiated or verified by the police. Although the above evidence was not disclosed to the defense, Anthony has not established that, had the evidence been disclosed, the result of the proceeding would have been different. Therefore, he failed to demonstrate that he was prejudiced by the failure to raise a *Brady* violation issue on his direct appeal. The post-conviction court erred in finding that Anthony received ineffective assistance of his appellate counsel.

II. Post-conviction Counsel

The right to counsel in post-conviction proceedings is guaranteed by neither the Sixth Amendment to the United States Constitution nor Article 1, section 13 of the Indiana Constitution. *Taylor v. State*, 882 N.E.2d 777, 783 (Ind. Ct. App. 2008). “A petition for post-conviction relief is not generally regarded as a criminal proceeding and does not call for a public trial within the meaning of these constitutional provisions.” *Id.* (quoting *Baum v. State*, 533 N.E.2d 1200, 1201 (Ind. 1989)). Therefore, the constitutional standards need not be employed when judging the performance of counsel prosecuting a post-conviction petition at the trial or appellate level. *Id.* We, therefore, apply a lesser standard “based on the principles inherent in protecting due process of law.” *Graves v. State*, 823 N.E.2d 1193,

1196 (Ind. 2005). If counsel actually appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court, it is not necessary to judge counsel's performance by the rigorous standard set forth in *Strickland*. *Taylor*, 882 N.E.2d at 783. Several cases have held that when counsel effectively abandons the petitioner at the post-conviction hearing and fails to present evidence in support of the petitioner's claim, the petitioner has been deprived of a procedurally fair hearing and ineffective assistance of post-conviction counsel has been shown. *Waters v. State*, 574 N.E.2d 911, 912 (Ind. 1991); *Taylor*, 882 N.E.2d at 784.

The State argues that the post-conviction court erred in finding that Ricks was ineffective as post-conviction counsel. It specifically contends that Ricks did not abandon Anthony in her representation of him as she appeared at the post-conviction hearing and presented evidence on his behalf. The State claims that Ricks's efforts in discovering witnesses that had not testified at Anthony's trial and having them testify at the hearing and in challenging the effectiveness of trial counsel in several respects demonstrated that Ricks rendered effective assistance in Anthony's original post-conviction proceedings.

We agree with the State. Ricks filed a petition for post-conviction relief on behalf of Anthony and appeared at the hearing. At the hearing, she presented the testimony of several witnesses who had not testified at Anthony's trial and were willing to present evidence. She also questioned Kerns regarding his decision not to call these witnesses at the trial, his decision not to seek a lesser included offense jury instruction, and the fact that he was retained by James, Anthony's father. Ricks also had Anthony testify regarding a discussion

he had with Kerns about potential witnesses to testify at the trial and about lesser included offenses. Ricks certainly did not abandon Anthony or fail to present any evidence on his behalf. We, therefore, conclude that Anthony was not deprived of a procedurally fair hearing, and the post-conviction court erred in finding that post-conviction counsel was ineffective.

Reversed.

BAKER, C.J., and NAJAM, J., concur.